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IN THE

Supreme Court of the United States

COUNTY OF LOS ANGELES, DEPUTY CHRISTOPHER CONLEY, AND DEPUTY JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION[1]

Plaintiffs bury the lede on page 42: The headline is that no one will support the Ninth Circuit's provocation rule. Recall that the Ninth Circuit announced one rule and applied another. The announced rule is: "Where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." Pet. App. 22a. And the rule the Ninth Circuit *applied* requires no actual provocation, just "that the deputies' unconstitutional conduct *created a situation which led to the shooting*." *Id.* (emphasis added).

Plaintiffs wholeheartedly defended the Ninth Circuit's rule in their Brief in Opposition (at 29), stating that the "Ninth Circuit's analysis is manifestly correct." But now, without warning, they decline any defense. The reason is that the Ninth Circuit's provocation rule is indefensible.

In its place, Plaintiffs offer a new "test," not suggested anywhere in their Brief in Opposition, which "differs from the Ninth Circuit's analysis," Resp. 43: "[I]n resolving excessive force claims, courts may entertain a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*,"

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[1] We abbreviate Brief for Petitioner "OB," Brief of Respondent "Resp.," Brief for the United States "U.S. Br.," and other amicus briefs as "___ Br.," according to the lead amicus's name or abbreviation.

which, they say, entails a "balancing test" entirely different from anything the Ninth Circuit considers. Resp. 42-43.

No court has ever adopted this test. It suffers from the same flaws as the Ninth Circuit's rule and layers in additional ones. It analyzes for "reasonableness" all police action, not just searches and seizures. This contradicts the Fourth Amendment itself, and conscripts judges and juries into the role of armchair quarterbacks second-guessing police tactics in the field.

By contrast, the test we endorse is the objective-reasonableness test this Court announced in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Plaintiffs and their amici respond not by critiquing our test but by attacking a straw-test that ignores the "totality of the circumstances" of a situation. That is not our test.

Plaintiffs' proximate cause argument fares no better. From the first page of their brief until almost the last, they insist that what proximately caused their injuries was the Deputies' failure to announce themselves before opening the shack door. But Plaintiffs never address the critical problem: The Court of Appeals held that the Deputies are entitled to qualified immunity on that claim.

So Plaintiffs try to link their injury to the Deputies' failure to secure a warrant before opening the shack's door. But the only way they can do that is by rejecting basic principles of proximate cause—including superseding cause—in favor of an expansive "foreseeability" test that considers only whether one could

have conceived of the possibility of a violent confrontation. A violent confrontation is foreseeable under that broad definition in almost any police intervention. That is never enough to establish liability, and certainly does not suffice here.

ARGUMENT

I. The Deputies' Use Of Force Was Constitutionally Reasonable.

Plaintiffs do not disagree that the Ninth Circuit's provocation rule should be rejected. In fact, neither they nor their amici defend that rule at all. Instead, Plaintiffs resort to criticizing a straw-test we did not propose—one that discards all context and myopically looks only at the "moment" "the bullet strik[es] Mr. and Mrs. Mendez." Resp. 35. But our test is simply this Court's *Graham* test, and Plaintiffs conceded below that the Deputies' use of force was reasonable under *Graham*. § I.A. Plaintiffs propose their own test that no court has adopted and that is even more problematic than the Ninth Circuit's provocation rule. § I.B. Even were this Court to accept Plaintiffs' rule, it must vacate the judgment below. § I.C.[2]

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[2] Plaintiffs organize their brief around the theory that the Court should decide the last Question Presented first, arguing that it is "wholly dispositive" and involves "nonconstitutional grounds." Resp. 18. But both issues are equally dispositive for Plaintiffs. And both involve constitutional issues: the standard for excessive force versus the availability of damages for officer force on a warrantless-entry claim. Moreover, the first Question considers the Ninth Circuit's provocation rule, which has been

A. This Court already set forth the correct analysis in *Graham*.

1. We do not advocate "a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished" or require courts to "pretend that critically important events leading to the use of force did not occur." Resp. 35. Nor does our proposed test ignore the "totality of the circumstances." Resp. 33-42. Rather, quoting verbatim from *Graham*, we explained that determining whether an officer's use of force was constitutional is an "objective" inquiry that pays "careful attention to the *facts and circumstances* of each particular case." OB21-22 (emphasis added).

Plaintiffs misunderstand what it means to say that reasonableness is evaluated as of "the moment" the force was used, "judged from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. An officer's perspective "includ[es] what the officer knew at the time." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). Past events of which an officer knew or should have known inform whether the force used was reasonable when it was applied. *See Saucier v. Katz*, 533 U.S. 194, 207 (2001).

The relevant facts and circumstances naturally focus on the nature of the threat the officer confronted and how he responded to that threat. Here, the totality of the circumstances includes that officers were looking for a parolee-at-large whom they believed to

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"sharply questioned" but which this Court has not had an opportunity to review. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 n.4 (2015).

be armed and dangerous. And they also "reasonably believed" that a man "holding [a] firearm rifle" pointed at them was "threaten[ing] their lives." Pet. App. 69a. Under that analysis, both courts below and Plaintiffs agreed that the Deputies' use of force was constitutionally reasonable. As the district court observed, "Mr. and Mrs. Mendez do not dispute that Deputies Conley and Pederson's use of deadly force—at the moment of shooting—was objectively []reasonable *under the totality of the circumstances*." Pet. App. 108a (emphasis added) (discussing JA230).[3] Plaintiffs cannot walk away from that concession now.

2. Yet, that is exactly what Plaintiffs try to do, by devising a new definition of "totality of the circumstances." They now claim this phrase overrides this Court's direction to assess reasonableness as of "the moment" force was used. *Graham*, 490 U.S. at 396. Instead, they claim, a use of force that was reasonable at that critical moment can be deemed unreasonable if a court concludes that the officers did something unreasonable in the events leading to the shooting.

But *Graham*'s focus on "the moment" force was used was integral to the Court's observation, in the same paragraph, that courts must "allow[] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 396-97.

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[3] The district court inadvertently stated that Plaintiffs conceded the force was "unreasonable." Pet. App. 108a. Context and syntax show the court meant "reasonable."

Thus, as the United States explained, "consideration of the facts and circumstances leading up to a use of force in evaluating the reasonableness of that action is different from using a prior unreasonable decision to impose liability for a reasonable use of force" or "from blaming police for the need to use force at all." U.S. Br. 25-26. The reality is that we expect officers to enter situations that could quickly devolve into danger. Domestic disputes, for example, are particularly volatile and thus the need to use force is almost always foreseeable. The surest way to ensure that officers "do nothing" when we need them to use reasonable force is to let a jury scrutinize their every move for any hint of unreasonableness, with the benefit of 20/20 hindsight. *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994); *see* OB33-36.

3. Plaintiffs admit that this Court has never held that an officer's pre-seizure actions that led to a need to use force factor into the *Graham* analysis. Resp. 37. The best they can muster is to claim that *Scott*, *Plumhoff*, and *Brower* "suggest (without expressly holding) that an excessive force claim can properly be based on official action foreseeably creating a need for force." *Id.* Those cases "suggest" no such thing.

Scott v. Harris, 550 U.S. 372 (2007), did not "devote[] two paragraphs [at 384-85] to the reasonableness of the officer's pre-crash actions." Resp. 38. The Court did not evaluate those pre-crash actions at all. *Scott* discussed how to "weigh[] the perhaps lesser probability of injuring or killing numerous bystanders [by not stopping the suspect] against the perhaps larger probability of injuring or killing a single person [by ramming him off the road]." 550 U.S. at 384. It

was all about the risk-benefit calculation of the choice the police made at the moment of the seizure to "ram[] respondent off the road[]." *Id.* at 385.

Plumhoff v. Rickard addressed the district court's holding that officers could not rely on the "danger presented by a high-speed chase" because "that danger was caused by the officers[]." 134 S. Ct. 2012, 2021 n.3 (2014). Plaintiffs wrongly contend that this Court "rejected it as factually unpersuasive rather than as legally irrelevant." Resp. 38. *Plumhoff* said that the district court "relied on *reasoning* that is irreconcilable with our decision in *Scott*." 134 S. Ct. at 2021 n.3 (emphasis added).

Plaintiffs argue (at 38) that *Brower v. Cty. of Inyo* supports shifting the reasonableness inquiry to acts that occur before the seizure (there, a roadblock) because the Court's remand to consider reasonableness included whether officers "set[] up the roadblock in such manner as to be likely to kill." 489 U.S. 593, 599 (1989). The roadblock was the means by which the seizure was effected. Of course, the manner in which the roadblock was set up—including "the allegation that headlights were used to blind the oncoming driver"—would factor into reasonableness. *Id.*[4]

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[4] Similarly, Plaintiffs cite *Kentucky v. King*, 563 U.S. 452 (2011), to argue that "[i]n other contexts, the Court's Fourth Amendment analysis also encompasses preceding events." Resp. 39. That point has no force since we agree that the preceding events can inform the analysis insofar as they provide context for the officer's decisions. In any event, *King* involved a specific exception to the search-warrant requirement, which requires a different analysis than excessive-force claims.

4. Plaintiffs resort to farfetched hypotheticals to urge that faithful adherence to *Graham* would "bar redress in a troubling range of situations." Resp. 41. These hypotheticals reflect two faulty premises.

The first, discussed above (at 4-5), is that our rule "excludes all context and causes prior to the moment the seizure is finally accomplished." Resp. 35. Take the example of an "officer [who] jumped in front of a moving car and then shot the driver to stop the car." Resp. 41. Can the officer be held liable? It depends on context. If the driver is a known killer who was two blocks away when the officer stepped into the street and sped up aiming at the officer, then deadly force would be justified. If the officer was apprehending the driver for a traffic violation and jumped so close in front of the car that it is clear that the driver had no reasonable opportunity to avoid the officer and was not using the car as a weapon, deadly force would be unreasonable.

The difference is driven by *Graham*'s focus on whether the use of force was reasonable at the time, under the facts and circumstances reasonably known to the officer, balancing the individual's and government's interests, without second-guessing the officer with hindsight bias.

The second faulty premise is that excessive force is the only possible route for challenging police conduct. Take Plaintiffs' police-officers-as-midnight-burglars hypothetical. Resp. 41. The injured homeowner there does not need an excessive-force claim. She can sue on the ground that the failure to knock—unlike

here—was a violation of clearly established law and the direct cause of her injuries.

A common feature of Plaintiffs' hypotheticals is how removed they are from the practical realities of policing. The norm is not officers entering homes like common burglars or endangering everyone around them as an excuse to use deadly force. The norm is officers every day entering situations that could become dangerous. Nearly all uses of force "begin with the decision of a police officer to do something, to help, to arrest, to inquire." *Plakas*, 19 F.3d at 1150. That is what we pay them to do.

Practically every violent encounter can be dissected with the luxury of hindsight to find a tactic for a jury to second-guess. *Sheehan*, 135 S. Ct. at 1777 (quoting *Saucier*, 533 U.S. at 216 n.6 (Ginsburg, J., concurring)). The only rule that encourages an officer to make the right decision at that split-second moment of truth is one that assesses the reasonableness of the officer's conduct at that moment. Any other rule will force the officer either to make the wrong choice, with tragic consequences, or to do nothing and avoid the encounter entirely. OB33-36.

B. Plaintiffs' substitute test is wrong and should be rejected.

Plaintiffs abandon the Ninth Circuit's test underpinning the principal holding below with the dodge that "the details of the Ninth Circuit standard are not helpful in delineating the correct standard." Resp. 43. Instead, Plaintiffs (on page 42) unveil their test: "[I]n resolving excessive force claims, courts may entertain

a claim that police action foreseeably created the need for the use of force against a claimant and should apply to the police action the general standard of reasonableness established by *Graham* and *Scott*." No court has ever adopted that test, and for good reason. It is even more problematic than the Ninth Circuit's rule, suffering from the same three flaws and adding more.

1. Like the provocation rule, Plaintiffs' rule is contrary to the Fourth Amendment. OB28-36. It improperly transforms force that is otherwise objectively reasonable into force that is deemed objectively *un*reasonable. Under such a test, it does not matter that the officer acted in reasonable defense of his life and his partner's.

But Plaintiffs' rule is even worse. In opposing certiorari (at 6), Plaintiffs exalted "important limitations" the Ninth Circuit placed on its provocation rule, including requiring that the so-called "provocation" be "an independent Fourth Amendment violation." Plaintiffs strip away even that protection, requiring no constitutional violation at all—much less a clearly established one.

Moreover, Plaintiffs' test would have courts apply "the general [*Graham*] standard of reasonableness" to "police action" that occurred before the use of force. That is contrary to the Fourth Amendment, which "covers only 'searches and seizures.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). Liability under Plaintiffs' test would be for a brand new tort: creating a dangerous situation. But the Fourth Amendment does not "prohibit[] creating unreasonably dangerous

circumstances" or bar "unreasonable, unjustified or outrageous conduct in general." *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992).

Plaintiffs' own illustrations reveal just how unmoored their new tort is from the Fourth Amendment: They would impose categorical liability on officers for some tactical decisions, such as entering the house of a "deranged," "incoherent[]," "mentally ill man" after communication efforts failed, Resp. 41-42, but categorically rule out liability for others, such as "entering a room in which armed robbers are holding a hostage," Resp. 44. But each situation officers face is different—suppose the hostage taker and "deranged" man are one and the same—and courts are poorly positioned to determine the appropriate response after the fact. That is why "a Fourth Amendment violation [cannot be] based merely on bad tactics that result in a deadly confrontation that could have been avoided." *Sheehan*, 135 S. Ct. at 1777.

2. By analyzing both the officer's predicate conduct and the seizure itself for general "reasonableness" and not violation of clearly established constitutional law, Plaintiffs' test guts qualified-immunity protections. OB36-40. Plaintiffs have never explained how liability for reasonable force may permissibly rest on an act or a tactic that violated no clearly established law. And, as demonstrated below (at 17-18), the main factor on which Plaintiffs base their assertion of unreasonableness is the failure to knock and announce a second time at the shack, which was *not* a clearly established violation.

3. Plaintiffs' rule still undermines proximate cause. In arguing otherwise, Plaintiffs emphasize that it was "foreseeable" that the Deputies' actions "could lead to a violent confrontation." Resp. 48. But proximate cause requires a direct relationship between the challenged conduct and the injury without a superseding cause. *See* OB43; Nat'l Ass'n of Counties Br. 16-17. Like the Ninth Circuit's provocation rule, Plaintiffs' proposed rule absolves a plaintiff of any obligation to prove that.

Plaintiffs' focus on foreseeability (especially as Plaintiffs define it, *see infra* 15-16) raises an even more serious problem: It is Plaintiffs (not us) who urge courts to "segment" the course of events, Resp. 33—in a far more troubling manner. Plaintiffs' proposed test looks only at an officer's pre-seizure conduct and asks whether "that police action foreseeably created the need for the use of force" in a way that a jury later considers unreasonable. Resp. 42. If the answer is yes, it is irrelevant what happened in the segment of time when the seizure occurred. Under Plaintiffs' test, it does not factor into the analysis that the Deputies confronted a man whom they reasonably perceived to be pointing a gun at them, and that they used force based on what everyone agrees was reasonable fear for their lives. Resp. 44-46.

C. Even if this Court accepts Plaintiffs' test, it must vacate the judgment.

Even if this Court were to adopt Plaintiffs' test, it must at least vacate the judgment below. That is not the test the district court applied. Nowhere in its provocation analysis did the district court "careful[ly]

balance[e] ... the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake," which Plaintiffs call for. Resp. 42-43 (quoting *Graham*, 490 U.S. at 396).

In fact, under Plaintiffs' test, this Court should reverse outright, because no reasonable factfinder could rule for Plaintiffs. Plaintiffs themselves ignore the "governmental interest" that is supposed to anchor the inquiry. Resp. 44. They do not even mention the governmental interest in ensuring that the Deputies act on their reasonable belief that their lives were in jeopardy when they confronted a man with what appeared to be a rifle. That alone justified the use of lethal force. *See* OB22-23.[5]

Next, Plaintiffs claim that the "intrusion on the Mendezes' Fourth Amendment rights was profound" because of the warrantless search. Resp. 45. But that conflates the search and the seizure. The § 1983 analysis must "begin[] by identifying the specific constitutional right allegedly infringed." *Graham*, 490 U.S. at 394. By seeking to hold the Deputies liable, not for

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[5] Plaintiffs also rely on numerous factual assertions that are contradicted by the district court's findings. Plaintiffs suggest that Mr. Mendez did not "point" the BB gun towards the Deputies, Resp. 13 n.8; that the Deputies "had [no] information that the parolee [O'Dell] was armed or dangerous," Resp. 44-45; and that the Deputies "lacked any credible information that [O'Dell] was in Plaintiffs' shack," *id.* But the district court found that Mr. Mendez "pointed" the BB gun "towards Deputy Conley," Pet. App. 69a; that the Deputies "believed [O'Dell] to be armed and dangerous," Pet. App. 65a; and that the Deputies "had probable cause to search for Mr. O'Dell inside the shack," Pet. App. 93a.

their reasonable use of force, but for other acts undertaken prior to the shooting, Plaintiffs' analysis contravenes this Court's settled analysis. *See* Nat'l Ass'n of Counties Br. 11-13.

Finally, Plaintiffs turn to the "balance of culpability," Resp. 46, an issue they claim comes from *Scott*, Resp. 43. But *Scott* considered something altogether different: the culpability of the suspect whose life would be at risk if the officer chose to ram his car versus that of *innocent bystanders* whose lives would be risked if the suspect continued to drive dangerously. *Supra* 6-7.

In any event, as Plaintiffs emphasize (at 34, 44-45), the situation must be viewed "from the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. What the Deputies reasonably perceived was a man pointing a gun at them. OB8-9. From that perspective, the bearer of the gun was highly culpable, even if that is not what he meant to do. Officers do not "violate[] the Constitution" when they "us[e] ... force" based on "reasonable, but mistaken, beliefs," especially the belief that someone is threateningly pointing a lethal weapon at point-blank range. *Saucier*, 533 U.S. at 205-06.

II. The Warrantless Entry Was Not A Proximate Cause Of Plaintiffs' Injuries.

Plaintiffs concede that both proximate cause and superseding cause revolve around principles of foreseeability. Resp. 21, 51. Yet, as to both, Plaintiffs apply a threshold of foreseeability that is inconsistent with this Court's precedents and basic tort principles.

§ II.A. When they do purport to apply principles this Court has prescribed—including scope of risk—Plaintiffs focus on the risk arising from the wrong violation and mischaracterize the risk arising from the right violation. § II.B. Plaintiffs' analysis of superseding cause shares this same flaw, but is compounded by adding an improper prerequisite of culpability. § II.C.

A. Plaintiffs' definition of foreseeability is improperly expansive.

As we explained (OB43-44), this Court has held that an officer who violated a clearly established constitutional right can be held liable only for an injury within the scope "protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). At points, Plaintiffs concede that "foreseeable" means within "the scope of the risk," Resp. 51 (quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014)), and that the terms are "synonymous," Resp. 53. Plaintiffs nevertheless maintain that their harms are compensable even if not "connected to the particular interest that the constitutional right was designed to protect." Resp. 51-52. Worse, in place of this basic principle, Plaintiffs propound a new theory of § 1983 liability that treats harm as "foreseeable" so long as an officer's action "*could* lead to a violent confrontation." Resp. 19 (emphasis added).

This conception of "foreseeability" is wrong. Under basic common-law principles of proximate cause and superseding cause, a harm is not "foreseeable" simply because it is a *conceivable* consequence of an action. Rather, it must be "the *natural* and *probable*

consequence." *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (emphasis added). "Foreseeability ... [is] a shorthand expression intended to say that the scope of the defendant's liability is determined by the scope of the risk he [tortiously] created." D. Dobbs et al., *The Law of Torts* § 205 (2d ed. 2016); D. Dobbs et al., *Prosser & Keeton on Torts*, § 43, 281 (5th ed. 1984). This risk-focused formulation is the "preferable" approach to discerning whether an injury is foreseeable. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 29 cmt. e.

This Court has explicitly embraced the fundamental tort principle that a harm is not "foreseeable" unless it falls within the "scope of the risk created by the predicate conduct." *Paroline*, 134 S. Ct. at 1719. This Court could not have been clearer about this in *Carey*. *Carey* examined "the elements and prerequisites for recovery of damages" under § 1983, and concluded that, "to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." 435 U.S. at 257-59, 264-65.

Despite this clear direction, Plaintiffs insist that *Carey* endorsed free-flowing liability untethered from the risk associated with the constitutional violation. They cite (at 52) the remark in *Carey* that, "[i]n some cases," § 1983 damages might be greater than those recoverable under "common-law tort rules." *Id.* at 258. But that just meant that § 1983 damages mirror common-law tort damages *unless* "the interests protected by a particular constitutional right [are] not

also ... protected by an analogous branch of the common law torts." *Id.* That passage did not detract from the explicit direction that the focus must be on the interests the constitutional right is "meant to protect," i.e., the "purpose" of the constitutional protection in question. *Id.* at 259, 262.

B. Injuries from the shooting were not within the scope of risk of the only relevant constitutional violation—the Deputies' warrantless entry.

1. When Plaintiffs turn to applying the correct scope-of-risk analysis, they erroneously apply it to the wrong conduct. At one point, Plaintiffs argue "that gunshot wounds are within the scope of the risk created by ... a shooting." Resp. 54. But the Ninth Circuit's *alternative* holding is premised on the assumption that the Deputies *cannot* be held liable for their reasonable use of force. Pet. App. 24a. The question is whether their injuries can be traced to a *different* act that *was* a constitutional violation.

There is only one violation that Plaintiffs could even try to link to their injuries: the failure to seek a warrant, because that is the only conduct for which the Deputies are not immune. Yet, Plaintiffs focus almost entirely on a *different* violation—the failure to knock and announce. On over 15 different pages Plaintiffs invoke the failure to "knock-and-announce," the Deputies' "barging" in "unannounced," "unidentified," "without warning" or "notice," and "startling" the Mendezes. *E.g.*, Resp. 1, 17, 19, 20, 22, 23, 24, 25,

28, 30, 36, 37, 46, 48, 49, 51, 57. That is impermissible, because the officers are immune from liability for that violation. Pet. App. 20a.

Plaintiffs argue that their reliance on "unannounced" is appropriate because the warrant and the knock-and-announce requirements protect the same constitutional interests and so there is "no reason to distinguish between [them]." Resp. 56. As we will demonstrate momentarily, this Court has said the opposite. So Plaintiffs must demonstrate that the injuries they suffered are within the scope of risk of a warrantless entry.

For similar reasons, Plaintiffs make no headway by asserting that the courts below found that the warrantless entry alone "'could lead to a violent confrontation.'" Resp. 23 (quoting Pet. App. 126a); *accord* Resp. 57-58. They held no such thing. The full sentence Plaintiffs partially quote from the district court actually says: "In this case, it was foreseeable that opening the door to the shack without a warrant (or warrant exception) *and without knocking-and-announcing* could lead to violent confrontation." Pet. App. 122a. Moreover, Plaintiffs never explain how the district court could have awarded only $1 in nominal damages if, as they maintain, it believed that the failure to secure a warrant caused the shooting. OB47. The Court of Appeals similarly relied on "the officers *barg[ing]* into the shack *unannounced*" as the proximate cause of shooting. Pet. App. 25a (emphasis added); *see* Pet. App. 21a-22a.

2. When the focus is appropriately cabined to the failure to secure a warrant, Plaintiffs' claim fails precisely because "[t]he interests protected by the knock-and-announce requirement are quite different" from the interests protected by the warrant requirement. *Hudson v. Michigan*, 547 U.S. 586, 593 (2006). The knock-and-announce requirement "protect[s] ... life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident." *Id.* at 594. That risk of injury has "nothing to do with whether the Fourth Amendment require[s] the officers to obtain a warrant." *United States v. Smith*, 526 F.3d 306, 311 (6th Cir. 2008).

Our opening brief identified the primarily privacy-based interests protected by the warrant requirement. OB44-45 (collecting authorities). Protecting "life and limb" of a resident "surprised" by an "unannounced entry" are not among them. Plaintiffs argue that the warrant requirement has "an *additional* purpose": "'assur[ing] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" Resp. 54 (quoting *Groh v. Ramirez*, 540 U.S. 551, 561 (2004)).

This Court has already rejected any linkage between the warrant requirement and preventing confrontations. That "argument assumes that the executing officer must present the property owner with a copy of the warrant before conducting [the] search" when, in fact, there is no "such ... requirement." *United States v. Grubbs*, 547 U.S. 90, 98-99 (2006) (citation omitted). The warrant requirement "does not protect an interest in monitoring searches"

or give a property owner "license to engage the police in a debate over the basis for the warrant." *Id.* at 99. This case illustrates the point. The result here would have been no different if the Deputies had a warrant in their pocket or had obtained a phone warrant just before entering the shack.

Nor do Plaintiffs' other authorities alter the analysis. Plaintiffs contend that the common law permitted citizens to use "self-help" to resist an unlawful search or seizure. Resp. 55. But those sources do not support the further proposition that the *purpose* of the *warrant requirement* is to avoid violent confrontation.

Finally, Plaintiffs suggest that the result *might* have been different if the Deputies had gotten a warrant because Plaintiffs might have left to find a bathroom or the Deputies might have knocked and announced if they had a warrant. Resp. 58. Both hypotheticals (the bathroom hypothetical, in particular) are quintessential examples of events that are outside the scope of the purpose of the right at issue. Those arguments also highlight precisely what the proximate cause requirement is designed to prevent: "intricate, uncertain," and "speculative" inquiries into what might have happened in a hypothetical chain of events. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 459-60 (2006).

3. Plaintiffs argue that none of this matters because proximate cause is not before this Court—only superseding cause. That argument is irrelevant and wrong.

It is irrelevant because the foreseeability principle is central to both proximate cause and superseding cause (as Plaintiffs concede, Resp. 21, 51) and the same scope-of-risk analysis applies to both, Resp. 51, 53. As the Restatement explains, "determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from [the prohibited] conduct." Restatement (Second) of Torts § 281 cmt. h. The rules for proximate and superseding cause are "functionally the same." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 34 cmt. a.

In any event, Plaintiffs are wrong. The Ninth Circuit's ruling had two alternative holdings, and our Petition clearly challenged both of them. As we explained, the third Question Presented challenged "[t]he Ninth Circuit's decision indicating [that] Defendants can be held liable for the shooting based upon proximate causation stemming from the predicate conduct of the earlier, unlawful entry." Pet. 34. We urged the Court to grant certiorari to consider "[w]hether damages stemming from a reasonable use of force were proximately caused by a prior, unlawful entry." Pet. 15; *accord* Pet. 16, 33-34. Our reply similarly emphasized that the warrantless entry did not proximately cause Plaintiffs' injuries. Cert. Reply 9-10. It is not appropriate to read the third Question Presented as limiting these expansive arguments.

Plaintiffs certainly did not read it that way. They explicitly recognized the wider scope that the Petition

plainly contemplates by rendering two Questions Presented as asking "[w]hether the Ninth Circuit's *proximate cause* analysis conflicts with decisions of this Court or other circuits," and "[w]hether the Ninth Cicuit correctly affirmed the district court's finding that the deputies' unlawful conduct *proximately caused* [Plaintiffs'] injuries." Brief in Opp. i (emphasis added). Far from suggesting they understood the Petition as limiting review to superseding cause, Plaintiffs argued, under the heading, "BASIC NOTIONS OF PROXIMATE CAUSE," that their injuries were "a direct consequence of Petitioners' unlawful actions ... under basic notions of proximate cause." *Id.* at 20, 22-23.

C. Mr. Mendez's pointing a gun at the Deputies was a superseding cause.

While the foregoing argument on foreseeability applies equally to both the proximate-cause analysis and superseding cause, Plaintiffs make another error specific to superseding cause. The parties agree that a superseding cause cuts off the proximate-causal chain. Resp. 20; OB51-53. But Plaintiffs incorrectly argue that an act can be a superseding cause only if it was both not "foreseeable" and "highly culpable." Resp. 21-22, 24 (quotation marks omitted). Plaintiffs misapply the first prong and are wrong about the second.

1. The flaws in Plaintiffs' view of "foreseeability" addressed above (at 15-16) are particularly problematic with regard to superseding cause. Plaintiffs argue that a suspect's threat of deadly force against an of-

ficer is not an "unforeseeable" superseding cause unless the suspect "know[s] or ha[s] reason to know that they were officers." Resp. 26. But, as Plaintiffs repeatedly emphasize (at 34, 43, 45), reasonableness of an officer's action is adjudged from the perspective of a reasonable officer on the scene. *See supra* 4. From the Deputies' perspective, they were engaged in a police investigation in broad daylight in uniforms identifying them as officers when they encountered a man pointing a gun at them. They had every reason to expect he would believe they were officers. Because it is "not ordinarily reasonable to foresee" that a person will attack a uniformed officer, *Hundley v. District of Columbia*, 494 F.3d 1097, 1105 (D.C. Cir. 2007), a person pointing a gun at a uniformed officer conducting a search is a superseding event regardless of what that person perceives.

2. Plaintiffs are also wrong that Mr. Mendez's pointing a gun at the Deputies cannot be a superseding cause because he was not "culpable." Resp. 21, 24-25. First, there is no such culpability requirement. A "superseding cause ... may be tortious or entirely innocent." Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 34 cmt b. Whether a person's conduct is "culpable" in the lay sense may be a *factor* in determining whether that conduct was a superseding cause, *see* U.S. Br. 28; Restatement (Second) of Torts § 442, but it is not a prerequisite, as Plaintiffs suggest.

Even if there were a culpability requirement, for the reasons discussed (at 22), it could not focus on whether Mr. Mendez knew the Deputies were officers or whether he intentionally threatened them. *E.g.*,

Resp. 28-30. Here, again, the inquiry considers only the Deputies' perspective. Whether or not it was permissible for the Deputies to open the shack's door in broad daylight, no uniformed officer in their position would perceive the threat they confronted to be anything other than culpable.

That does not mean that "a homeowner has only himself or herself to blame, and no legal recourse whatsoever, if he or she picks up a firearm ... to fend off an unidentified and unlawful intruder ... and is then shot by an unidentified police officer." Resp. 25. As indicated above, if an officer breaks in like a common burglar such that any reasonable officer would know that he would not be perceived as an officer, there could be recourse. Same in any other context where the officer's failure to identify himself was a violation of clearly established law. But not in this unique circumstance where the shooting was the result of a tragic confluence of reasonable misperceptions on both sides and where the officers' failure to identify themselves cannot be the basis for liability.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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